United Food and Commercial Workers Union, Local 4, Affiliated with United Food and Commercial Workers Union (Safeway, Inc.) *and* Pamela Barrett. Case 19–CB–009660

February 22, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

This case, on remand from the United States Court of Appeals for the Ninth Circuit, involves the straightforward application of existing precedent concerning employees who object to paying dues for nonrepresentational activities pursuant to the Supreme Court's decision in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), and the sufficiency of the financial information a union must provide to these objectors to satisfy its duty of fair representation under the Board's decisions in *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998), and *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474 (1999), reconsideration denied 327 NLRB 802 (1999), petition for review dismissed 1999 WL 325508 (D.C. Cir. 1999).

On October 31, 2008, the National Labor Relations Board, acting with two members, issued a Decision and Order in this proceeding, reversing the May 20, 2008 decision of Administrative Law Judge James M. Kennedy and finding that the Respondent violated Section 8(b)(1)(A) of the Act by failing to provide the Charging Party, a *Beck* objector, with sufficiently verified financial information, consistent with its obligations under *California Saw* and *KGW Radio*.[1] On August 26, 2010, a three-member panel of the Board affirmed and adopted this action.[2]

Subsequently, the Board filed a petition for enforcement of its August 26, 2010 Order with the Ninth Circuit. On October 31, 2011, the court issued its decision. Given what the court viewed as a lack of clarity in the Board's August 26, 2010 Order, the court found that it could not determine whether that Order affirmed or reversed the administrative law judge's decision, or whether the Order announced a rule that departed from prior Board precedent. As a result, the court denied the Board's petition for enforcement, vacated the August 26, 2010 Order, as modified by a subsequent unpublished Order, and remanded the matter to the Board for it to "issue an order that has a clear meaning and rationale." *NLRB v. United Food and Commercial Workers, Local 4*, No. 10-72655, slip op. at 4 (9th Cir. Oct. 31, 2011). In so doing, the court explained that, in light of the lack of clear meaning and rationale in the Order, the court had not considered the merits of, nor the applicable standard of review for, this case. Id.

The Board has delegated its authority in this proceeding to a three-member panel. We have accepted the court's remand and have decided to review the administrative law judge's May 20, 2008 decision anew. The Board has thus considered the judge's decision and the record in light of the General Counsel's exceptions, the Respondent's cross-exceptions, and the parties' briefs and has decided to adopt the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Specifically, as discussed more fully below, we reverse the judge's finding and conclude that the Respondent violated its duty of fair representation and therefore Section 8(b)(1)(A) by failing to provide the Charging Party with sufficiently verified financial information in connection with her *Beck* objection. In our decision today, we apply the well-established precedent set forth in *California Saw* and *KGW Radio* and announce no new rule of law. We shall substitute a new Order and notice consistent with this decision.

I. BACKGROUND

The Respondent is a local union representing a unit of retail employees at the Safeway grocery store in Whitefish, Montana. At the time of the events at issue in this case, the employees were covered by a collective-bargaining agreement, which contained a union-security clause. Charging Party Pamela Barrett began working at the Whitefish store on April 4, 2007.[3] On May 4, the Respondent notified Barrett of her right to either join Local 4 or become a dues-paying nonmember of the local to satisfy the obligations of the union-security clause, and, if she opted for the latter, to object to having her dues payments expended on nonrepresentational activities.[4] Subsequently, on May 9, Barrett notified the Re-

[1] 353 NLRB 469, as modified by a January 21, 2009 unpublished order.

[2] 355 NLRB 634, as modified by a September 24, 2010 unpublished order.

[3] Unless otherwise stated, all dates are 2007.

[4] A union-security clause obligates an employee's payment of dues to the representative union as a condition of employment. Sometimes known as a "financial core" member, a dues-paying nonmember is one who meets the dues obligations of union membership to satisfy a union-security clause but neither enters into a formal affiliation with the union nor is required to meet any other obligations of formal membership

spondent that she did not wish to be a union member and that she wanted to pay only the "agency fee," that is, an amount solely based on the union's expenses for representational matters. She also requested a "verified financial disclosure of union expenditures."

On May 11, the Respondent acknowledged Barrett's request for nonmember status and informed her that her dues would be $31.50 per month, or 95 percent of the current rate for nonobjector members. To establish the appropriateness of her dues reduction, the Respondent provided Barrett with a 1-page financial statement, breaking down its expenses as either chargeable for representational matters or nonchargeable, for the year ending December 31, 2006, and stating the chargeable rate to be 95 percent. The Respondent also provided Barrett with its International Union's 2005 audited financial statement, which stated that the International's chargeable expense rate was 85 percent. The Respondent reiterated this information in a May 16 letter to Barrett.

On May 29, Barrett responded in writing that she "was not provided with any information that explains or justifies the calculation of this high agency fee." She again requested that the Respondent provide her a verified financial disclosure explaining the basis for the "agency fee." On June 15, the Respondent replied, stating that it was a small local union and thus had few nonchargeable expenses. The Respondent directed Barrett to the expenditure information it provided on May 11 and once again asserted that her nonmember dues would be $31.50 per month.

On December 14, in an apparent effort to settle the case, the Respondent refunded Barrett the difference between the dues she paid from May to December at the 95-percent chargeable expense rate and the amount she would have paid had her dues been calculated using the International Union's lower 85-percent rate. It also acknowledged that when it initially provided its statement of chargeable expenses on May 11, it did not include a report showing that the figures in the statement were reviewed by an accountant. The Respondent then provided an "Independent Accountant's Report," dated February 19, which stated that an independent accountant had reviewed the Respondent's expenditure statement, with the caveats that the information included in the statement was based solely on the representations of the Respondent's management and that the accountant's assessment of the information was "substantially less in scope than an audit." The Respondent also stated its intent to charge Barrett at the 95-percent rate as of January 1, 2008, although it appeared, as of the time of the hearing in this case, that the Respondent continued to calculate her dues at the 85-percent rate.

apart from the dues requirement. See *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

II. JUDGE'S DECISION

At the hearing, the witnesses' testimony and the parties' arguments centered on whether the expenditure information the Respondent provided to Barrett on May 11, which formed the basis for the 95-percent chargeable expense rate, was sufficiently verified pursuant to *California Saw* and *KGW Radio*, discussed below.[5] Following the hearing, the judge, in a bench decision, concluded that the May 11 expenditure information satisfied the Board's verification requirements. He noted that although the Respondent's "Independent Accountant's Report" was based only on materials provided by the Respondent, and thus the accountant had not made independent inquiry into the Respondent's transactions, the representations of Respondent's officers concerning its expenses nonetheless provided adequate assurance of the accuracy of the information. He thus found that the Respondent did not violate its duty of fair representation and dismissed the complaint.

III. ANALYSIS

In *Communication Workers v. Beck*, supra, the Supreme Court addressed the question whether a union's expenditure of dues, paid by an objecting nonmember, on nonrepresentational matters violates the duty of fair representation. The Supreme Court held that, in view of the structure and purpose of the Act, a union may lawfully collect from an objecting nonmember only those dues necessary to finance activities germane to the union's role as collective-bargaining agent. 487 U.S. at 754–755.

[5] Although the complaint alleges that the Respondent violated Sec. 8(b)(1)(A) of the Act by failing to provide Barrett with an adequate explanation of the discrepancy between the International Union's total amount for chargeable expenses (85 percent) and the Respondent's total amount for chargeable expenses (95 percent), at the hearing the parties focused on the unalleged issue of whether the expenditure information the Respondent provided to Barrett was sufficiently verified under the Board's standards. The judge thus did not pass on the complaint allegation and instead addressed the unalleged issue litigated by the parties. Because the unalleged issue addressed by the judge is closely related to the complaint allegation and the parties actively litigated this unalleged issue, we find that the judge properly considered it. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

In his exceptions, the General Counsel argues that the Respondent also violated Sec. 8(b)(1)(A) by failing, as specifically alleged in the complaint, to explain the discrepancy between its percentage of chargeable expenses and that of the International Union, and the General Counsel seeks remand of this issue to the judge for further consideration. We find a remand unnecessary. In light of our finding below that the Respondent violated the Board's standards regarding verification of expenditure information, any additional finding of a violation on remand would be cumulative and would not materially affect the remedy.

Thereafter, the Board addressed what procedures a union must undertake to meet its duty of fair representation with respect to potential *Beck* objectors. In *California Saw*, the Board held that a union breaches its duty of fair representation if it fails to inform unit employees of their *Beck* rights. The Board also held that once an employee objects to paying dues for nonrepresentational activities and seeks a reduction in fees for such activities, the employee must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures. 320 NLRB at 233. To determine whether the information given to objectors satisfies the union's duty of fair representation, the Board stated that it would assess whether the information is sufficient to enable the objector to determine whether to challenge the dues-reduction calculations. Id. at 239.

In *KGW Radio*, the Board addressed the adequacy of the expenditure information provided to a *Beck* objector as the basis for the calculation of the percentage of the dues reduction. The Board squarely held that a union must provide a *Beck* objector with an audited statement of its chargeable and nonchargeable expenses,[6] and that the union's failure to do so violates the duty of fair representation it owes to the employee. See *KGW Radio*, 327 NLRB at 476–477. The Board explained that "requiring an audit, within the generally accepted meaning of the term, in which the auditor independently verifies that the expenditures claimed were actually made rather than accepts the representations of the union, is consistent with the plain language, purpose, and intent of *California Saw*." Id. at 477.[7] The Board further explained that no "particular type of audit is mandated by the verification requirement under *California Saw*." Id. Instead, the Board reiterated that a union satisfies the Board's verification requirement so long as an auditor independently verifies that the expenditures claimed were in fact made. See id.[8]

In the present case, the judge found that although an independent accounting firm reviewed the expenditure information provided by the Respondent's officials, the firm did not engage in an audit or otherwise inspect and verify the underlying transactions that the reported expenses comprised. Instead, the Respondent's accounting firm merely reviewed the 2006 expenditure information provided to Barrett on May 11, and the firm's report given to Barrett specifically provides that all of the information in the financial statement is the representation of the Respondent's officials. There is no evidence in the record that the accounting firm independently verified that the expenses claimed by the Respondent were in fact made. Thus, the expenditure information provided by the Respondent to Barrett does not meet the minimum verification standards set by the Board in *KGW Radio* to fulfill the Respondent's duty of fair representation to Barrett.[9] Accordingly, we reverse the judge's decision and find that the Respondent violated its duty of fair representation and thus Section 8(b)(1)(A) by failing to provide sufficiently audited expenditure information to Barrett.

ORDER

The National Labor Relations Board orders that the Respondent, United Food and Commercial Workers Union Local 4, affiliated with United Food and Commercial Workers Union, Butte, Montana, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Providing to nonmember objectors expenditure information that is neither sufficiently verified nor supported by a local presumption.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[6] The issue of whether a given expense is chargeable or nonchargeable is a question on which the audit need not opine. See *KGW Radio*, 327 NLRB at 477. The audit need only ensure that the expenditures claimed were actually made. The question whether a given expenditure is chargeable or not is a question of law separate from the expenditure verification requirement.

[7] Alternatively, the Board stated that the dues reduction information provided by a local union to a charging party may be based on what is known as a "local presumption." *KGW Radio*, 327 NLRB at 477 fn. 15. That is, the local may present the *Beck* objector with the audited expenses of the international union with which it is affiliated in lieu of performing an audit of its own expenses, *if* it chooses to rely on the international's expenditure breakdown for prorating the objector's dues. See *Thomas v. NLRB*, 213 F.3d 651, 659, 661 (D.C. Cir. 2000). Here, although the Respondent provided Barrett with an audited expense breakdown for the International Union, which reflected that 85 percent of the International's expenses were chargeable, it did *not* invoke the local presumption and instead relied on its own chargeable expenses of 95 percent.

[8] The auditor performing the audit need not be a Certified Public Accountant or an auditor from outside of the union's organization. See *California Saw*, 320 NLRB at 240–242. The use of an "in-house auditor" is permissible so long as that auditor appropriately performs the usual functions of an auditor, i.e., determines that the expenditures claimed were in fact made. Id.

[9] We decline the Respondent's request that the Board depart from existing law and adopt a more lenient verification requirement similar to the verification required by the Department of Labor for union officials completing the Department's Form LM-2.

Further, we decline the Respondent's request to change the terminology the Board uses regarding dues objectors and to change the wording of notice postings ordered in cases in which unions prevail.

(a) For all accounting periods covered by the complaint, provide Pamela Barrett with information concerning expenditures by the Respondent (or, in the event that the Respondent relies on a local presumption, expenditures by its parent union) that has been verified by an independent auditor. If Barrett, with reasonable promptness after receiving this information, challenges the dues reduction calculation for any such accounting period, process such challenge as it would otherwise have done in accordance with the principles of *California Saw & Knife*, 320 NLRB 224 (1995).

(b) Within 14 days after service by the Region, post at its offices in Butte, Montana, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with employees whom it represents by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director for Region 19 sufficient copies of the notice for posting by Safeway, if willing, at all places at its Whitefish, Montana store where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 22, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT provide to nonmember objectors expenditure information that is neither sufficiently verified nor supported by a local presumption.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide Pamela Barrett with information concerning our expenditures (or, in the event that we rely on a local presumption, expenditures by our parent union) that has been verified by an independent auditor.

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 4, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS UNION

The Board's decision can be found at www.nlrb.gov/case/19-CB-009660 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, D.C. 20570, or by calling (202) 273–1940.